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United States Government Accountability Office
Washington, DC 20548

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October 30, 2009

The Honorable Christopher J. Dodd
Chairman
The Honorable Richard C. Shelby
Ranking Minority Member
Committee on Banking, Housing, and Urban Affairs
United States Senate

The Honorable Barney Frank
Chairman
The Honorable Spencer Bachus
Ranking Minority Member
Committee on Financial Services
House of Representatives

Subject: *Securities and Exchange Commission: Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Securities and Exchange Commission (Commission), entitled “Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers” (RIN: 3235-AK48). We received the rule on October 14, 2009. It was published in the *Federal Register* as a final rule on October 19, 2009, with an effective date of December 18, 2009. 74 Fed. Reg. 53,628.

The final rule amends temporary rules¹ which extended compliance dates under the Sarbanes-Oxley Act of 2002. Under section 404(b) of the Act, companies that are non-accelerated filers² are required to include in their annual reports an attestation report of their independent auditor on internal control over financial reporting (ICFR) for fiscal years ending on or after December 15, 2009. The final rule postpones for an additional six months the date by which a non-accelerated filer

¹ See, e.g., Rule 2-02T of Regulation S-X (17 C.F.R. § 210.2-02T).

² The Commission states that although the term “non-accelerated filer” is not defined in its rules, it is used to refer to an Exchange Act reporting company that does not meet the Rule 12b-2 [17 CFR 140.12b-2] definition of either an “accelerated filer” or a “large accelerated filer.”

must begin to include an auditor's attestation report on ICFR with its annual report. On October 2, 2009, the Commission made public a staff study that assessed whether the new management guidance and a new auditing standard are having the intended effect of facilitating more cost-effective ICFR evaluations and audits for smaller reporting companies. In light of the proximity in time of the publication of the staff study and the end of the year, and concerns that a significant number of smaller public companies may not have prepared to comply with Section 404(b) pending completion of the staff study, the final rule will extend the compliance date for filing attestation reports with an annual report to the date on which a non-accelerated filer will have to file an annual report for a fiscal year ending on or after June 15, 2010.

The obligation of non-accelerated filers to comply with Section 404(b) has been deferred a number of times to more than five years after the date on which compliance was required of accelerated filers. The Commission notes that all steps necessary to implement the requirements of Section 404 of the Sarbanes-Oxley Act have been completed. The Commission does not expect to further defer the obligations of non-accelerated filers to comply with Section 404(b).

Enclosed is our assessment of the Commission's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the Commission complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Elizabeth Murphy
Secretary, Securities and
Exchange Commission

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
SECURITIES AND EXCHANGE COMMISSION
ENTITLED
"INTERNAL CONTROL OVER FINANCIAL REPORTING
IN EXCHANGE ACT PERIODIC REPORTS OF
NON-ACCELERATED FILERS"
(RIN: 3235-AK48)

(i) Cost-benefit analysis

The Commission states the benefits of this rule are that non-accelerated filers will be required to complete only management's assessment of compliance with the Section 404 requirements during the deferral period. The final rule also allows non-accelerated filers more time to better prepare for compliance with the Section 404(b) requirements and for the Section 404(b) audit to be properly planned, scoped and executed. The Commission states the cost of this rule is that investors in non-accelerated filers will have to wait longer than they would in the absence of the deferral for the assurances provided by the auditor's attestation report and the added investor confidence that could result from obtaining an independent Section 404(b) attestation.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The Commission did not provide a Final Regulatory Flexibility Analysis because it relied on the good faith exception under Section 553(b)(3)(B) of the Administrative Procedure Act to forego notice and comment.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

As an independent regulatory agency, the Commission is not subject to title II of the Unfunded Mandates Reform Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On the basis of the timing constraints discussed earlier and the limited nature of the extension, the Commission states that it found "good cause" under 5 U.S.C. § 553 to forego the normal notice and comment procedures regarding the final rule because they are impracticable, unnecessary or contrary to the public interest, and the

extension is necessary or appropriate in the public interest and consistent with the protection of investors.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

In connection with the Commission's earlier proposal and adoption of the rules and amendments implementing the Section 404 requirements, the Commission submitted cost and burden estimates of the collection of information requirements to the Office of Management and Budget (OMB) and published a notice requesting comment on the collection of information requirements in the proposing release for those rule amendments. The Commission received approval for these new collection of information requirements. Because the Commission does not believe that the final rule will result in any change in the collection of information requirements and it previously received no comments on the burdens associated with these requirements, the Commission did not revise its Paperwork Reduction Act burden and cost estimates submitted to OMB.

Statutory authorization for the rule

The Commission states that the final rule is made under the authority set forth in Section 19 of the Securities Act, Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, and Sections 3(a) and 404 of the Sarbanes-Oxley Act.

Executive Order No. 12,866 (Regulatory Planning and Review)

As an independent regulatory agency, the Commission is not subject to the review requirements of the order.

Executive Order No. 13,132 (Federalism)

As an independent regulatory agency, the Commission is not subject to the review requirements of the order.